



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO FSD 162 OF 2019 (RPJ)**

**BETWEEN:-**

**RAIFFEISEN BANK INTERNATIONAL AG (RBI)  
(a company incorporated in Austria)**

**Plaintiff**

**-and-**

**(1) SCULLY ROYALTY LTD  
(a company incorporated in the Cayman Islands)  
(2) LTC PHARMA (INT) LTD  
(a company incorporated in the Marshall Islands)  
(3) MERKANTI HOLDING PLC  
(a company incorporated in Malta)  
(4) 1178936 BC LTD  
(a company incorporated in British Columbia, Canada)  
(5) GARDAWORLD CN LTD  
(a company incorporated in the Marshall Islands)  
(6) 1128349 BC LTD  
(a company incorporated in British Columbia, Canada)  
(7) IEM SERVICES CO LTD.  
(a company incorporated in the Marshall Islands)  
(8) LTCM ASSETS PRIVATE LIMITED  
(a company incorporated in Liberia)  
(9) MICHAEL JOHN SMITH**

**Defendants**

**Before:** The Hon. Justice Raj Parker

**Appearances:** Mr Christopher Levers and Ms Victoria King of Ogier on behalf of the Plaintiff

Mr Alex Potts KC of counsel instructed by Mr Jonathon Milne of Conyers Dill Pearman LLP on behalf of the Ninth Defendant

Mr Rupert Wheeler of KSG on behalf of the First and Third to Seventh Defendants (the KSG Defendants)

**Heard:** 14 June 2024

**Draft Ruling circulated** 19 June 2024

**Ruling Delivered:** 27 June 2024

*Leave to appeal from recusal decision--test-real prospect of success-public interest-stay-discretion*

## **RULING**

### **Introduction**

1. Michael John Smith, D9<sup>1</sup> applies for leave to appeal the Order of 25 March 2024 by which I dismissed Mr Smith's application by summons dated 27 September 2023 that I should recuse myself, and ordered that Mr Smith pay RBI's costs to be taxed on the standard basis if not agreed.
2. A Judgment dated 19 March 2024 gave the Court's reasoning.
3. He also applies for a stay or adjournment of the proceedings generally pending determination of the recusal application. RBI opposes both applications.
4. The Court has reviewed Mr Smith's third affidavit of 9 April 2024 together with exhibit containing the draft notice of appeal and memorandum of grounds of appeal and Mr Constable's first affidavit of 18 April 2024 exhibiting inter attorney correspondence in April 2024.
5. An oral hearing for leave and for a stay took place on 14 June 2024. Mr Alex Potts KC appeared for D9. Mr Christopher Levers appeared for RBI. Mr Rupert Wheeler appeared for the KSG Defendants.

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<sup>1</sup> As the Court has already recorded, Mr Smith is a director and Chairman of and a shareholder in D1, which is the parent company of all the other KSG Defendants. He was until May 2021 the President and CEO of D1.

**Law**

6. Mr Smith requires leave to appeal the March 2024 Order. It is common ground that the issue of recusal is not a matter of discretion. The Court having heard argument decided that the recusal application failed and gave reasons in a reserved Judgment.
7. The test as to whether the Court should grant leave to appeal that decision is whether Mr Smith has a real prospect of establishing on appeal that I was wrong not to recuse myself. This would involve an assessment that there was a real prospect that I erred in law and/or as a matter of principle, in finding that a fair minded and informed observer would not conclude that there was a real possibility of bias.<sup>2</sup> Leave may also be given if there is a point of public interest which should be examined by the Court of Appeal.

**Decision**

8. I have considered the arguments both written and oral of both parties and the evidence submitted. I have in particular reviewed the notice and grounds of appeal.
9. I have concluded that the application has no real prospect of success. In addition, there is no point of public interest or other reason which would make leave appropriate.<sup>3</sup>
10. Further, having reached this conclusion, I have concluded that there is no good reason for a stay or to adjourn the proceedings pending any further application to the Court of Appeal.
11. The points advanced on this application were each the subject of oral and written argument on the previous occasion and each of them was addressed in the written judgment of 19 March 2024. The matters relied on include allegedly inadmissible evidence, an alleged failure to give reasons, findings as to Mr Smith's 2019 affidavit evidence, and findings on the KSG Defendants' applications. Having considered each of these and the grounds in their totality I am not persuaded that there is a real prospect of establishing that the Court's determination that a fair minded and informed observer would find that there was no real possibility of bias or predetermination was wrong.
12. As to whether there is any other good reason to give leave to appeal, the question of judicial impartiality is clearly of paramount importance to the administration of justice. That of itself does

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<sup>2</sup> *Multibank v. VDHI* [BVIHCMAP 2022/0001] (29 April 2022), at [46] per Michel JA, with whom Webster and Farara JJA agreed. A decision of Eastern Caribbean Supreme Court, Court of Appeal, BVI.

<sup>3</sup> *Telesystem International Wireless Inc v CVC/Opportunity Equity Partners LP* [2001] CILR N 21

not justify the granting of leave whenever it is called into question. Neither are there any specific matters of public interest or policy in this case which would justify this Court giving leave.

13. The Court is not persuaded, having reviewed the authorities relied on by Mr Smith, that leave should be given by the Court which heard the recusal application because the Court of Appeal will be 'better placed' to determine the question of impartiality.<sup>4</sup>
14. Nor is the Court persuaded that it is in the interests of the administration of justice, that the question of this Court's impartiality should be determined by the Court of Appeal rather than, as Mr Potts KC put it, "... *being allowed to hang over the litigation, and the parties, at every further hearing that takes place before the Judge, going forwards.*" The Court has an important filtering function with regard to matters which require leave to appeal its decisions. The prospect of a successful appeal must be real. Mr Smith is entitled to renew his application to the Court of Appeal for leave if he so wishes.
15. As to the application for a stay, RBI agrees that the jurisdiction application that D9 intends to bring and which was filed in September 2023 should be heard after the recusal application has been finally dealt with. D9 has not persuaded me that there are exceptional circumstances which would justify a stay or adjournment, having regard to the balance of convenience and interests of justice in this case. I have also considered whether a limited stay should be granted pending any application for leave to appeal from the Court of Appeal and decided that there is no good reason for that either in all the circumstances.
16. The Court has taken into account D9's position that he will have to incur costs in preparing for his jurisdiction challenge and may have to deal with contested matters before me in relation to procedural matters pending any further application to the Court of Appeal.
17. Having considered these arguments the Court is of the view that they do not amount to a good reason for a stay and that refusing a stay poses no prejudice to Mr Smith's substantive rights. The Court is not persuaded that Mr Smith's appeal will be effectively stifled, and/or rendered nugatory if a stay is not ordered.
18. The parties should liaise to agree directions for the timetabling of evidence, submissions and other preparatory steps necessary for the jurisdiction application. That will minimise potential delay once any appeal of the recusal application is finally determined (subject to leave being granted by the Court of Appeal) and will allow the parties to secure an earlier listing.

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<sup>4</sup> *Morrison & Anor v AWG Group Ltd & Anor* [2006] EWCA Civ 6, per Mummery LJ at paragraphs 19 to 20 *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, per Etherton LJ at paragraph 41 and *Riley v Attorney-General* [2020] Eastern Caribbean Court of Appeal, judgment dated 17 September 2020, per Baptiste JA at paragraphs 50 to 53.

19. The other defendants (the KSG Defendants), who would be affected by any stay if it were applied to proceedings which did not only affect D9,<sup>5</sup> have said they would suffer prejudice if a lengthy stay occurred, and reserve the right to make complaint that the delay is the fault of RBI because of its belated decision to join Mr Smith as a defendant. It is also right to record that they wish to adopt a neutral stance on the stay aspect, because they recognise that there may be practical difficulties in advancing the jurisdiction application.
20. They also say that all parties could be exposed to unnecessary costs if Mr Smith's challenge to jurisdiction and joinder and the substantive proceedings carry on in parallel to Mr Smith's appeal, if his appeal is ultimately successful and jurisdiction and joinder is set aside. The Court has taken that eventuality into account. If that should occur, the Court can order costs to be paid by RBI at an appropriate stage, but it is not a reason to hold up preparation for the jurisdiction application or the substantive proceedings, which have already taken years to progress.
21. The leave and stay applications are both dismissed, and Mr Smith is to pay RBI's costs of both applications, to be taxed on the standard basis if not agreed. There is no order as to any costs on the part of the KSG Defendants.
22. The parties are to file and exchange, within two weeks of the Court's order being finalised, draft agreed directions for the jurisdiction application.



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**THE HON. MR. JUSTICE RAJ PARKER**  
**JUDGE OF THE GRAND COURT**

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<sup>5</sup> The interim freezing injunction in this case has been in place for a number of years.